IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1235 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

ABDUL MAJID AHMED DESAI

Appearance:

MR KP RAVAL, APP for Appellant

MR BS PATEL for Respondent No. 1, 2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 27/07/2000

ORAL JUDGEMENT

1. This Appeal is preferred against the judgment of Additional Sessions Judge (Special Judge), Bharuch on 8th October, 1992, by which the present respondents came to be acquitted for the offences punishable under sections

336, 427, 504, 506 (2), 114 of the IPC and Section 3(1)(7) & (10) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

2. Incident in question occurred on 8th October, 1981, at village Dayadara of Bharuch District at about 11.45 a.m. near or at the house of the complainant. Complainant alleged that he belonged to Hindu Vanker community and both the accused belonged to the same village. Accused No.1 i.e. respondent No.1.is the father and accused No.2 - the respondent No.2 is the son. Accused No.1 - Abdul Majid Ahmed Desai and the father of the complainant - Mangalbhai Laljibhai, were the contesting candidates for the election of Sarpanch of village Dayadara. 7th October, 1991 was the day of election of the Sarpanch of Dayadara Gram Panchayat and on the day of incident i.e. 8th October, 1992, the counting of the election of Sarpanch of Dayadara Gram Panchayat at Bharuch, was proceedings, as per the say of the complainant Bhikhabhai Managalbhai.

3. Accused No.1 was defeated in the said election and, therefore, accused were annoyed and they rushed to the house of the complainant with hockey in their hands, because they were residing just adjacent to the house of the complainant and his father. Further, the story of the prosecution proceeds further that both the accused jumped the compound wall and came near the house of the complainant and gave filthy abuses and utter words, which insulted complainant and his father, as they belonged to scheduled castes. Both accused also thrown stones on the roof of the house of the complainant and damaged roof tiles. After the incident, complainant went to Bharuch with the typed complaint and gave that to the DSP, Bharuch, and on the same day, the offence for the above said charges, came to be registered against the present respondents.

4. In this Special Case No. 1 of 1992 the charge was framed against both the respondents, vide Exh.1 on 16.7.1992 by the Special Judge i.e. Addl. Sessions Judge, Bharuch, and both the respondents denied the charges. Prosecution tendered oral as well as documentary evidence and examined 7 witnesses. After recording of further statement of the accused and after hearing prosecution as well as defence, learned Special Judge, Bharuch, came to the conclusion that prosecution was not able to prove charges beyond reasonable doubt, and therefore, accused were required to be acquitted for the offences punishable under Sections 336, 427, 504, 506(2) 114 of the IPC and Section 333(1)(7) & (10) of the

Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

5. Learned APP Mr. K.P. Raval for the appellant was heard at length. He submitted that there are in all 4 eye witnesses to the incident and they are (1) Complainant, (2) his father, (3) PW6 Isap Asmal Bhatta and (4) PW5 Kantibhai Mangalbhai. Learned APP has submitted that by the evidence of 4 eye witnesses, prosecution was able to prove the charges levelled against the accused. It was further argued that learned trial judge erred in appreciating the evidence of these eye witnesses. It was further submitted that there may be minor contradictions, which would not go to the root of the prosecution case which ought not to have been taken into consideration by the trial judge while appreciating the evidence. It was further urged that the Appeal requires to be allowed. Learned Advocate Mr. B.S. Patel for the respondents was not present at the time of hearing, however, we have gone through the record and the evidence in its entirety and carefully.

6. On appreciating the evidence carefully and scrutinising the circumstances, there appears to be glaring discrepancy and material contradictions in the evidence of prosecution witnesses. If the prosecution story is tested by the touchstone of probability and improbability, a doubt is created whether the witnesses truly depose the genesis of the prosecution story. The circumstances which arose doubts in the story of the prosecution are as under :

(i) Complainant Bhikhabhai Mangalbhai Vanker, PW1, has been examined at Exh.8, whose father Mangalbhai Laljibhai was contesting the election of Sarpanch of Dayadara Gram Panchayat against the accused No.1. He has made a deviation in deposition from his say in the complaint - Exh.9.

(ii) PW1 - complainant (Exh.8) is found to be in the habit of filing criminal complaints frequently. The fact is proved by some of the documentary evidence placed on record.

(iii) It is revealed that the counting of the votes was proceeding on 8th October, 1991 at the Mamlatdar Office at Bharuch. Ordinarily, father of the complainant PW4 Mangalbhai Laljibhai, who was contesting election, would be present at the counting place. It is not made clear by the prosecution when the counting started and ended.

The incident took place at 11.45 p.m. on the same day. The presence of Mangalbhai Laljibhai - PW4 - Exh.25 at the scene of offence, therefore, becomes doubtful.

(iv) PW5 Kantibhai Mangalbhai - Exh.26, poses himself to be an eye witness of the incident. As per the prosecution story, this witness was present when the incident took place at the relevant time. It was further found that this witness was serving in the Office of the Director of Livestock and as per Exh.42, a certificate given by that office, the witness was on duty from 8.00 a.m. to 12.00 p.m. and 3.00 p.m. to 5.30 p.m. Therefore, the presence of this witness becomes doubtful at the scene of offence. This is not enough. This witness further makes improvement in his evidence and stated that though he was on duty, but on hearing shouts, he rushed to the place of incident and this is not the prosecution version. Therefore, this fact creates doubt in the prosecution story.

(v) It is established in the evidence that compound wall around the house of Bhikhabhai Mangalbhai PW1 is having the height of 7 to 8 feet. His father PW4 Mangalbhai Lajibhai also resides adjoining to the house of Bhikhabhai and there is a partition wall between these two houses. Now, the prosecution story is that both the accused came to the house of the complainant jumping the compound wall. When this fact was considered and appreciated by touchstone of probability, it clearly appears that there is something wrong with the prosecution story or the complainant Bhikhabhai, on oath did not narrate the true version of the incident because it was humanly impossible to jump a wall of 8 feet.

(vi) It is established fact by the evidence that on 8th October, 1991, there was police bandobast at village Dayadara on account of Gram Panchayat election. PW-7 Chhaitanya Prasad Raval, PSI, examined at Exh. 31, was on duty at village Dayadara, who was the investigating Officer in this case. Even then, as per prosecution story, complainant went to Bharuch, gave a typed complaint to the D.S.P., and thereafter the offence came to be registered. The conduct of the complainant and the time gap, sufficiently leave room to conclude that the complainant had

time to deliberate the facts in the complaint.

(vii) The witness - Exh.25 PW4 Mangalbhai Lajibhai admits that the Executive Magistrate and other concerned officers were contacted and they visited the houses of PW-1 and PW-4, but none of such witnesses, however, examined by the prosecution.

(viii) There is obvious departure in the evidence of complainant PW1 - Exh.8 from his say in the complaint - Exh.9. In whole of the evidence, at least in examination-in-chief, complainant - PW 1 refers to accused No.1, while in complaint, he states that both accused came to his house with hockey in their hands. However, he did not refer to accused No.2 during his examination-in-chief.

(ix) It is not clear from the evidence of PW-1 Bhikhabhai Mangalbhai and PW-4 Mangalbhai Lalabhai at Exh.8 and Exh. 25 respectively that actually near whose house, the incident took place. The evidence of PW1, gives an impression that the incident took place in his house, while, PW-4 Mangalbhai Laljibhai, Exh.25, in his evidence, has narrated that the incident took place at his house, though the fact is that both reside separately in the adjoining houses.

(x) PW4 - Exh.25 Mangalbhai Laljibhai, narrated a different story than the one stated in the FIR by other witnesses to the incident that accused No.1 had jumped in the vanda and has abused the complainant and his father i.e. this witness. This witness further states that during this time, accused No.2 was throwing tiles from his roof to the roof of this witness - Mangalbhai Lajibhai.

(xi) PW4 - Exh.25 - Mangalbhai Laljibhai further admits in his deposition that soon after the occurrence of the incident, he went to PSI Mr. Raval, but he did not give any complaint to PSI Mr. Raval.

(xii) Witness No. 6 - Isap Asmail Bhatta - Exh.30 is the fourth eye witness of the prosecution. However, he stated in his deposition that he was suffering from short sight and myopia and that he was not in a position to see from distance of 2

feet. It is also established that previously also this witness was so called witness in so many cases and, therefore, no reliance could be placed in his deposition.

7. This is an Appeal against the order of acquittal. Though this court exercises the same power as that is available to the court hearing the appeal against the order of conviction, the celebrated principle of law is that, the court will not interfere with an order of acquittal solely because some different view can be taken than the view taken by the trial. Therefore, unless and until this court comes to a definite conclusion that the view taken by the trial judge on the evidence was not correct and was not viewed with reasonable mind from the materials on the record, no interference is called for in an acquittal appeal.

8. Applying the aforesaid criteria of principle of law to the present facts, it clearly emerges that the trial judge appreciated the evidence correctly for the aforesaid reasons, the doubt was created in the prosecution case and in evidence and, therefore, the prosecution could not establish the case beyond reasonable doubt against the accused. The trial judge having considered evidence on record, properly, rightly came to the conclusion that the accused were entitled to benefit of reasonable doubt. The order of acquittal recorded by the trial judge does not require any interference by this court.

9. In the result, this Appeal has no substance and the same is dismissed.

(J.R. Vora, J.)

---

p.n.nair